IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

OCTOBER TERM, 1952

CIVIL ACTION, No. 2448

HOUSTON FIRE AND CASUALTY INSURANCE COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

MOTION TO DISMISS OR AFFIRM

Filed June 11, 1953

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court, appellees, United States of America and Interstate Commerce Commission, move that the appeal in this case be dismissed or, in the alternative, that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment dismissing appellant's complaint, entered on April 14, 1953 by a three-judge district court convened pursuant to 28 U.S.C. 2284, 2325. The complaint

sought to set aside a determination by the Commission that it would be unable to approve appellant's certificates of insurance as meeting the standards promulgated under Part II of the Interstate Commerce Act, without first receiving and having an opportunity to consider certain requested date bearing on appellant's financial stability. Finding that the determination which appellant sought to review was interlocutory in character, the district court dismissed the suit for want of jurisdiction.[1] Appeal was allowed on May 26, 1953, and the appeal papers were served on May 29, 1953.

The essential facts are simple and uncontroverted. Appellant, a casualty insurance company doing business in Texas and other states, is affiliated with two other insurance companies and with an investment banking company. All four companies are under the same management and are located at the same address. The inter-corporate structure of the companies is as follows: Associated Employers Lloyds, an insurance company, owns all of the capital stock of the Inland Investment Company, which is an investment company and not authorized to engage in the insurance business. Inland, in turn, owns all of the capital stock of appellant. Appellant is the parent of the General Insurance Company. Mr. J. M. Ferguson is attorney-in-fact of Lloyds and president of appellant, Inland and General.

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[1] Judge Davidson, concurring in the result, expressed the view that the case should have been dismissed on the merits. The opinion of the court and the separate opinion of Judge Davidson are appended to the Statement as to Jurisdiction.

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As indicated *infra,* the Commission's statutory duties require it to determine the qualifications of insurance companies to act as insurers of motor carriers operating under Commission jurisdiction. In the course of exercising this function, the Commission examined a report issued on December 31, 1950, by the Department of Insurance of the State of Texas, relating to certain financial practices of Lloyds and Inland, the two companies at the top of the four-company pyramid.[2] Concluding that the financial practices of the interlocked companies, as disclosed by the Department of Insurance's report, warranted further study, the Commission by letter of February 21, 1952, requested Mr. Ferguson to furnish copies of the financial statements of the four companies.

Statements relative to the three insurance companies were provided, but no data was furnished

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[2] As pertinent portion of that report, quoted in the court's opinion, reads as follows:

"It is the practice of the Lloyds to make substantial loans to its wholly owned subsidiary, Inland Investment Company. It is the further practice for the Lloyds to receive payment of the loans in late December and re-loan the funds in early January. The above total (referring to commercial notes in the total of $20,750.00) represents the balance remaining in the account of December 31, 1950.

"On December 31, 1950, the Inland Investment Company repaid $1,000,000.00 in Federal Government Bonds. Inland Investment Company obtained the $1,000,000.00 with which to repay the loans from a Dallas bank. In January 1951, the Lloyds sold the bonds, reloaned the $1,000,000.00 to the Inland Investment Company, and the latter Company repaid the note to the Dallas bank. The cancelled note to the bank was inspected. It provided for interest at the rate of 1-½% and was due January 15, 1951. A note was made by the Inland Investment Company bearing no endorsements."

concerning the Inland Investment Company. A second letter was accordingly addressed to Mr. Ferguson on March 11, 1952, calling attention to the fact that no information had been received with respect to Inland and that, since the three insurance companies were financially tied to Inland, it was necessary to obtain such information in order to ascertain their financial qualifications. This request was rejected, and on June 2, 1952, Division 5 voted to withhold approval of further certificates of insurance submitted by the three insurance companies on behalf of authorized motor carriers until the information in question was made available. A petition to reconsider this ruling was denied by the entire Commission on October 6, 1952. Appellant thereupon filed its suit in the district court.

We submit that the district court correctly held that the Commission's action in this case was interlocutory, and not subject to judicial review. We further submit—as found by the concurring judge below—that the substantive question which appellant raises is insubstantial.

1. Section 215 of the Interstate Commerce Act requires authorized motor carriers to carry insurance, and empowers the Commission to prescribe "reasonable rules and regulations" for the "filing and approval" of applicable insurance policies. Pursuant to this Section, the Commission has promulgated comprehensive rules governing the form and amount of insurance that carriers must have, and the qualifications of companies writing

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such insurance. 49 C.F.R. 174.1-174.10 (1949 ed.). These rules provide for Commission disapproval of any insurance policy which, "in its judgment," "for any reason, fails to provide satisfactory or adequate protection for the public." 49 C.F.R. 174.9 (1949 ed.).

In administering these rules—whose validity appellant does not challenge—the Commission's general practice has been to require companies whose policies are submitted for approval to furnish adequate information from which the Commission can determine their financial stability. When the Texas Department of Insurance publicized certain inter-corporate financial transactions between appellant's parent companies, the Commission properly requested data on such transactions, including a financial statement of the affiliated investment company. Since the three insurance companies and the investment company were operated under joint management and control, this information was "necessary to an understanding of the collective [financial] statements of the three insurance companies." The information was sought as a basis for the Commission's ultimate determination as to whether appellant's policies "provide satisfactory or adequate protection for the public."

By refusing to furnish this information, appellant prevented the Commission from making this ultimate determination. For, without seeing the full financial picture, the Commission could not ascertain appellant's true financial condition. The Commission thus never reached the ultimate issue

in the administrative proceeding—whether appellant's policies did provide adequate protection for the public. Instead, it informed appellant that, until the data was furnished, the Commission would not accept appellant's policies for filing. In so doing, the Commission did not attempt—or purport—to determine appellant's financial stability.

Appellant could have fully protected its rights by furnishing the requested data under protest. For, if the Commission then proceeded to approve appellant's policies, that would have been the end of the matter. If, on the other hand, the Commission went on to find that the policies did not provide satisfactory protection for the public, appellant would have had ample opportunity to challenge all interlocutory rulings in a proceeding to review the Commission's final order of disapproval. Appellant has no right to judicial review merely because, in seeking Commission permission to serve as an insurer for authorized motor carriers, it is required, as a condition to further Commission consideration of its application, to furnish pertinent financial data. The judicial power does not extend to review of "mere procedural requirements or interlocutory directions," *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384.

2. Even if there were some question as to the interlocutory character of the Commission's action, the judgment dismissing the complaint should nonetheless be affirmed, it being clear that the case presents no issue of fact and that the narrow issue

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of law which appellant seeks to raise is entirely without substance. *Cf. Keifer-Stewart Co.* v. *Seagrams & Sons*, 340 U. S. 211, 214.

Appellant does not challenge the undoubted statutory power of the Commission to adopt measures designed to make certain that motor carriers under the Commission's jurisdiction carry adequate insurance with suitable and financially responsible insurance companies. See Interstate Commerce Act, Section 215 (49 U.S.C. 315). Indeed, it concedes in its Statement as to Jurisdiction that the "Commission may have the power under statute to prescribe rules and regulations under which it could proceed as it did here * * *" Appellant's argument comes down to the contention that the procedure followed by the Commission in this case was improper because the Commission did not have a specific rule or regulation requiring the production of the precise kind of information which was requested, *i.e.*, a rule requiring a prospective motor carrier insurer to make available, on demand, a financial statement showing the condition of a banking company owning all of the insurer's capital stock. Appellant, it should be stressed, does not question the relevance of such information to the achievement of the regulatory purpose which the Commission is charged to pursue. It states simply that it has brought its "action * * * to have the court condemn the action of Appellee Commission of June 2 and October 6, 1952, without regard as to the wisdom thereof" (Statement as to Jurisdiction).

The Commission's Motor Carrier Regulations provide in part (49 C.F.R. 174.8 (b) (1949 ed.):

> *Financial Resources.* Each insurance company must possess the minimum financial resources applicable to it as hereinafter provided, which minimum will be determined on the basis of the values of assets and liabilities as shown in its financial statements filed with and approved by the inurance department or other insurance regulatory authority of the state of domicile (home state) of such company, *except in the instances where, in the judgment of the Commission, additional evidence with respect to such values is considered necessary*: * * * [Emphasis supplied.]

The Commission acted under this rule when it requested the additional evidence with respect to Inland. The rule, it is perfectly true, does not attempt the fruitless task of determining *in vacuo* what types of additional information may be called for in particular cases which may arise at a future date. Plainly, the Commission may specify in detail what it needs when the need occurs. Indeed, it is difficult to see how else it might operate, save, perhaps, by adopting a general rule requiring the most elaborate production of information in any and all cases—a course which could serve but to impose unnecessary burdens on the Commission and insurers alike. Since appellant was given full notice concerning the specific information sought and accorded every opportunity to comply with the request, its contention that it has been prej-

udiced by the lack of a more specific rule can only be characterized as frivolous.

For the foregoing reasons, it is submitted that the appeal should be dismissed or, in the alternative, that the judgment of the district court should be affirmed.

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